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3:17-cv-0016-MMD-VPC

**REPORT AND RECOMMENDATION**  
**OF U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is plaintiff's motion for reversal and/or remand (ECF No. 22), defendant's cross-motion to affirm (ECF Nos. 23), and plaintiff's reply (ECF No. 24). For the reasons set forth herein, the court recommends that plaintiff's motion be denied, and defendant's cross-motion be granted.

## I. FACTUAL AND PROCEDURAL BACKGROUND

On April 3, 2012, Kathy R. Gray Matheny (“plaintiff”) plaintiff filed for Supplemental Security Income (“SSI”) benefits under Title XVI of the Social Security Act. (Administrative Record (“AR”) 216–19.) Plaintiff alleged a disability onset date of April 2, 2012. (*Id.*) The Social Security Administration denied plaintiff’s application in the first instance on July 17, 2012, (*Id.* at 119-25), and upon reconsideration on March 14, 2013. (*Id.* at 126–38.)

On March 3, 2015, plaintiff and her attorney appeared at a hearing before Administrative Law Judge (“ALJ”) Eileen Burlison. (*Id.* at 48–75.) Jacklyn Benson-Dehaan, a vocational expert (“VE”), also appeared at the hearing. (*Id.*) The ALJ issued a written decision on May 8, 2015, finding that plaintiff had not been disabled at any time between the alleged onset date and the date of the decision. (*Id.* at 30-47.) Plaintiff appealed, and the Appeals Council denied review on May 23, 2016. (*Id.* at 20–25.) Accordingly, the ALJ’s decision became the final decision of the

1 Commissioner (“defendant”). Having exhausted all administrative remedies, plaintiff received a  
2 thirty-day extension to file her civil action on November 23, 2016, (AR 1–19), and thereafter filed  
3 her complaint for judicial review on December 23, 2016. (ECF No. 1.)

## 4 II. STANDARD OF REVIEW

5 The initial burden of proof to establish disability in a claim for SSDI benefits rests upon  
6 the claimant. *Molina v. Astrue*, 674 F.3d 1104, 1110 (9th Cir. 2012). To satisfy this burden, the  
7 claimant must demonstrate an “inability to engage in any substantial gainful activity by reason of  
8 any medically determinable physical or mental impairment which can be expected . . . to last for a  
9 continuous period of not less than 12 months . . .” 42 U.S.C. § 423(d)(1)(A).

10 This court has jurisdiction to review an ALJ’s decision to deny a claim for benefits after  
11 the claimant has exhausted all administrative remedies. *See Brewes v. Comm’r of Soc. Sec.*  
12 *Admin.*, 682 F.3d 1157, 1161–62 (9th Cir. 2012). The court must affirm the ALJ’s decision  
13 unless it rests on legal error or is unsupported by substantial evidence in the administrative  
14 record. *Garrison v. Colvin*, 759 F.3d 995, 1009 (9th Cir. 2014); *see also* 42 U.S.C. § 405(g)  
15 (“The findings of the Commissioner of Social Security as to any fact, if supported by substantial  
16 evidence, shall be conclusive.”). The substantial evidence standard is not onerous. It is “more  
17 than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable  
18 mind might accept as adequate to support a conclusion.” *Hill v. Astrue*, 698 F.3d 1153, 1159 (9th  
19 Cir. 2012) (internal quotation omitted).

20 Although the ALJ need not discuss every piece of evidence in the record, she cannot  
21 ignore or omit evidence that is significant or probative. *Hiler v. Astrue*, 687 F.3d 1208, 1212 (9th  
22 Cir. 2012). The ALJ’s discussion must adequately explain the decision in light of such evidence.  
23 “The ALJ, not the district court, is required to provide specific reasons for rejecting [the  
24 evidence.]” *Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1054 (9th Cir. 2006) (specifically  
25 discussing rejection of lay testimony). The district court’s review is thus constrained to the  
26 reasons asserted by the ALJ. *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003).

27 To determine whether substantial evidence exists, the court must look at the record as a  
28 whole, considering both evidence that supports and undermines the ALJ’s decision; it “may not

1 affirm simply by isolating a specific quantum of supporting evidence.” *Robbins v. Soc. Sec.*  
2 *Admin.*, 466 F.3d 880, 882 (9th Cir. 2006) (internal quotation omitted). Where “the evidence is  
3 susceptible of more than one rational interpretation, the decision of the ALJ must be upheld.”  
4 *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007) (internal quotation omitted). The ALJ alone is  
5 responsible for determining credibility and resolving ambiguities. *Garrison*, 759 F.3d at 1010.

### 6 **III. DISCUSSION**

#### 7 **A. SSDI claims are evaluated under a five-step sequential process.**

8 The Commissioner follows a five-step sequential process for determining whether a  
9 claimant is “disabled” for the purposes of SSDI. 20 C.F.R. § 404.1520(a)(4); *see also Barnhart v.*  
10 *Thomas*, 540 U.S. 20, 24 (2003). Step one directs the ALJ to determine whether the claimant is  
11 engaged in “substantial gainful activity.” 20 C.F.R. § 404.1520(a)(4)(i). If so, the claimant is not  
12 disabled and the Commissioner denies the claim. *Id.* § 404.1520(b).

13 The second step requires the ALJ to determine whether the claimant’s medically  
14 determinable impairment is “severe.” *Id.* § 404.1520(a)(4)(ii). “Severe” impairments are those  
15 that significantly limit the claimant’s physical or mental ability to do basic work activities. *Id.* §  
16 404.1520(c). The Commissioner will deny the claim if the claimant lacks a severe impairment or  
17 combination of impairments. *Id.*

18 At step three, the claimant’s impairment is compared to those listed in the Social Security  
19 Regulations at 20 C.F.R. Pt. 404, Subpart P, Appendix 1. *Id.* § 404.1520(a)(4)(iii). The list in  
20 Appendix 1 “define[s] impairments that would prevent an adult, regardless of his [or her] age,  
21 education, or work experience, from performing *any* gainful activity, not just substantial gainful  
22 activity.” *Sullivan v. Zebley*, 493 U.S. 521, 532 (1990) (internal quotation omitted) (emphasis in  
23 original). Where the claimant’s impairment is on the list, or is equivalent to a listed impairment,  
24 and the claimant also meets the corresponding durational requirement, the claimant is deemed  
25 disabled. 20 C.F.R. § 404.1520(d). However, for an impairment to match a listing, “it must meet  
26 *all* of the specified medical criteria. An impairment that manifests only some of those criteria, no  
27 matter how severely, does not qualify.” *Zebley*, 493 U.S. at 530 (emphasis in original).

1           If the Commissioner does not find disability at step three, review of the claim proceeds to  
2 step four. There, the ALJ considers whether the claimant can perform past relevant work despite  
3 the severe impairment. 20 C.F.R. § 404.1520(a)(4)(iv). If so, the claimant is not disabled. *Id.* §  
4 404.1520(e). The ALJ will find that the claimant can return to past relevant work if he or she can  
5 perform the “actual functional demands and job duties of a particular past relevant job” or the  
6 “functional demands and job duties of the [past] occupation as generally required by employers  
7 throughout the national economy.” *Pinto v. Massanari*, 249 F.3d 840, 845 (9th Cir. 2001)  
8 (internal quotation omitted).

9           In making the step four determination, the ALJ considers the claimant’s RFC and the  
10 physical and mental demands of the work previously performed. 20 C.F.R. § 404.1520(f); *see*  
11 *also Berry v. Astrue*, 622 F.3d 1228, 1231 (9th Cir. 2010). The RFC is the most the claimant can  
12 do despite his or her limitations. 20 C.F.R. § 404.1545(a)(1). To determine the claimant’s RFC,  
13 the ALJ must assess all the evidence, including medical reports and descriptions by the claimant  
14 and others of the claimant’s relevant limitations. *See id.* § 404.1545(a)(3). The ALJ is not,  
15 however, required to accept as true every allegation the claimant offers regarding his or her  
16 limitations. *Orn v. Astrue*, 495 F.3d 625, 635 (9th Cir. 2007). The ALJ must follow a two-prong  
17 inquiry where the claimant alleges subjective pain or symptoms. *Lingenfelter v. Astrue*, 504 F.3d  
18 1028, 1035–36 (9th Cir. 2007); *see also* SSR 96-7p, 61 Fed. Reg. 34483 (July 2, 1996). First, the  
19 ALJ determines “whether the claimant has presented objective medical evidence of an underlying  
20 impairment which could reasonably be expected to produce the pain or other symptoms alleged.”  
21 *Lingenfelter*, 504 F.3d at 1036 (internal quotation omitted). Second, if the first prong is met and  
22 no evidence suggests that the claimant is a malingerer, the ALJ may reject the claimant’s  
23 allegations only by articulating “clear and convincing” reasons for doing so. *Id.*

24           The “clear and convincing” standard is the most demanding standard in Social Security  
25 case law, *Garrison*, 759 F.3d at 1015, and it requires the ALJ to “specifically identify the  
26 testimony she or he finds not to be credible and [to] explain what evidence undermines the  
27 testimony,” *Holohan v. Massanari*, 246 F.3d 1195, 1208 (9th Cir. 2001). The ALJ must therefore  
28 cite to the record and discuss specific evidence therein. *See Vasquez v. Astrue*, 572 F.3d 586,

1 591–92, 592 n.1 (9th Cir. 2008); *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). The ALJ  
2 may consider a variety of factors in weighing a claimant’s credibility, including inconsistencies in  
3 a claimant’s testimony, his or her reputation for truthfulness, an inadequately explained failure to  
4 seek treatment, or a lack of support from the medical evidence. 20 C.F.R. § 404.1529(c); *Orn*,  
5 495 F.3d at 636. The focus, however, is ultimately upon the reviewing court. The credibility  
6 determination must be “‘sufficiently specific to allow a reviewing court to conclude the ALJ  
7 rejected the claimant’s testimony on permissible grounds and did not arbitrarily discredit the  
8 claimant’s testimony.’” *Moisa v. Barnhart*, 367 F.3d 882, 885 (9th Cir. 2004) (quoting *Rollins v.*  
9 *Massanari*, 261 F.3d 853, 856–57 (9th Cir. 2001)).

10 If step four demonstrates that the claimant cannot do the work he or she did in the past, the  
11 burden shifts to the Commissioner to establish, in step five, that the claimant can perform jobs  
12 available in the national economy. 20 C.F.R. § 404.1560(c). There, the ALJ must consider the  
13 claimant’s RFC, age, education, and past work experience to determine whether the claimant can  
14 do other work. *Bowen v. Yuckert*, 482 U.S. 137, 142 (1987); *Hoopai v. Astrue*, 499 F.3d 1071,  
15 1075 (9th Cir. 2007). The ALJ will typically reference “the grids,” under which a finding of  
16 disability may be directed, and also consider the testimony of a VE. *Tackett v. Apfel*, 180 F.3d  
17 1094, 1101 (9th Cir. 1999). Where the grids do not direct a finding of disability, the ALJ must  
18 identify other jobs that the claimant can perform and which are available in significant numbers in  
19 the claimant’s region or in several regions of the United States. 42 U.S.C. § 423(d)(2)(A); 20  
20 C.F.R. § 404.1560(c). If the ALJ establishes that the claimant’s RFC and transferable skills allow  
21 him or her to perform other occupations, the claimant is not disabled. 20 C.F.R. § 404.1566.  
22 Conversely, if the ALJ concludes that the claimant cannot adjust to any other work, he or she is  
23 disabled and entitled to benefits. *Id.* § 404.1520(g).

24 **B. The ALJ followed the five-step process and concluded that plaintiff was not disabled.**

25 In reviewing plaintiff’s claims for benefits, the ALJ followed the five-step process  
26 described above. The ALJ first determined that plaintiff had not engaged in substantial gainful  
27 activity since April 3, 2012, the application date. (AR 36.)  
28

1 At step two, the ALJ found that plaintiff's history of congestive heart failure,  
2 cardiomyopathy, hypertension, and obesity were severe impairments that significantly limited her  
3 ability to perform basic-work related functions. (*Id.*) The ALJ also considered evidence  
4 regarding a variety of other diagnoses, but concluded that the evidence did not show those  
5 conditions to be severe or to cause any secondary issues warranting additional functional  
6 limitations. (*Id.*) Though plaintiff produced evidence that she had been diagnosed with chronic  
7 obstructive pulmonary disease ("COPD") and back pain, the ALJ found that these medically  
8 determinable impairments did not limit her ability to work and were thus nonsevere. (*Id.*)  
9 Regarding plaintiff's COPD, the ALJ relied on medical records indicating that plaintiff's  
10 respiratory examinations "have been largely normal." (*Id.*) The ALJ also noted that plaintiff was  
11 not required to use her supplemental oxygen during the day, and that there was no evidence  
12 plaintiff required frequent in-person hospitalizations due to her COPD. (*Id.*) As to plaintiff's  
13 back pain, the ALJ found that it had been treated conservatively with medication, did not require  
14 specialized treatment, and that the majority of her treatment records note only vague complaints  
15 of pain without any other objective findings. (*Id.*) Finally, the ALJ found that plaintiff's  
16 medically determinable mental impairments were nonsevere because they "do not cause more  
17 than minimal limitation in the [plaintiff's] ability to perform basic mental work activities ...."  
18 (AR 37.)

19 At step three, the ALJ concluded that plaintiff did not have an impairment or combination  
20 of impairments that met or medically equaled the severity of any listed impairment. (*Id.* at 23–  
21 25.)

22 The ALJ proceeded to step four and made several findings. To begin, the ALJ concluded  
23 that plaintiff had the RFC to perform light work, but with some limitations. (*Id.* at 18.) For  
24 example, the ALJ found that plaintiff can occasionally climb, balance, stoop, kneel, crouch, and  
25 crawl. (*Id.* at 39.) However, plaintiff should avoid temperature extremes, and avoid all exposure  
26 to hazards at unprotected heights or dangerous machinery. (*Id.*) Next, the ALJ found that  
27 plaintiff's impairments could be expected to cause the symptoms alleged, but that her statements  
28 regarding the intensity, persistence, and limiting effects of those symptoms were not entirely

1 credible. (*Id.* at 40–41.) In reaching this conclusion, the ALJ reviewed and discussed the  
2 objective medical evidence, medical opinions, and factors weighing against plaintiff’s credibility.  
3 (*Id.*) Finally, based on the evidence in the record and the testimony of the VE, the ALJ concluded  
4 that plaintiff was capable of performing her past relevant work as a waitress. (*Id.* at 41–42.)

5 A claimant is deemed not disabled at step four if capable of performing past relevant  
6 work. 20 C.F.R. § 416.960(b)(3). Thus, having found that plaintiff could perform her past work,  
7 the ALJ held that she was not disabled and denied her claim for benefits. (AR 42–43.)

8 **C. The ALJ permissibly discounted plaintiff’s subjective testimony.**

9 Plaintiff challenges just one aspect of the ALJ’s decision: her adverse credibility finding.  
10 (ECF No. 16 at 5–10.) Plaintiff contends that the ALJ failed to articulate clear and convincing  
11 reasons for discounting plaintiff’s testimony, and, therefore, that her disability determination  
12 lacks the support of substantial evidence. (*Id.*)

13 In her decision, the ALJ found plaintiff’s allegations of disabling symptoms and  
14 limitations less than fully credible for three reasons: (1) the extent of plaintiff’s reported daily  
15 activities belies her alleged limitations; (2) there is evidence that the plaintiff misrepresented facts  
16 relevant to the issue of her disability; and (3) objective evidence in the record did not support  
17 plaintiff’s testimony as to the severity of her symptoms. (*See* AR 39–41). Each is discussed in  
18 turn.

19 **1. Plaintiff’s Daily Activities Are Consistent with Her Pain-Related Testimony**

20 First, the ALJ concluded that plaintiff “describes daily activities that are not limited to the  
21 extent that one would expect” given the symptoms she claims to have. (AR 40.) The ALJ relies  
22 on plaintiff’s hearing testimony, where plaintiff testified that she can do the dishes, drive, and  
23 care for her personal hygiene. (*Id.*; *see* AR 60–62.) The ALJ also cited to plaintiff’s function  
24 report, where she states that she can shop for groceries and handle her finances. (AR 40; *see* AR  
25 255–56.) The ALJ found plaintiff’s activities require physical, mental, and social capabilities that  
26 “replicate those necessary for obtaining and maintaining employment.” (AR 40.)

27 Plaintiff contends that the ALJ failed to consider plaintiff’s additional testimony that  
28 although she drives and cares for her personal hygiene, she does so on a diminished basis and

1 occasionally requires assistance from her husband. (ECF No. 22 at 7.) Plaintiff further contends  
2 that the ALJ failed to explain how the identified activities replicate the functions necessary for a  
3 full-time job. (*Id.*) Finally, plaintiff asserts that the ALJ disregarded the findings of “every  
4 physician of record,” which confirms plaintiff’s alleged pain, dysfunction, and limitations. (*Id.*)  
5 Defendant counters with a citation to the record, wherein a physician stated that plaintiff can have  
6 “an active lifestyle without limitations.” (ECF No. 23 at 6.) Plaintiff replies that the court must  
7 disregard the ALJ’s finding because ALJ did not rely on medical evidence in finding that  
8 plaintiff’s daily activities conflict with her purported symptoms. (ECF No. 24 at 4.)

9 As a preliminary matter, the court will not consider the claims advanced by plaintiff and  
10 defendant regarding the medical record. The ALJ did not reference the medical record in  
11 determining that plaintiff’s described activities are inconsistent with her statements about the  
12 impairments caused by her pain. Rather, the ALJ referred only to plaintiff’s hearing testimony  
13 given on March 3, 2015, (AR 48–74) and plaintiff’s function report, which plaintiff self-  
14 completed on May 8, 2012 (AR 252–260). This court’s review is constrained to the reasons  
15 asserted by the ALJ. *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003).

16 Although the ALJ alone is responsible for determining credibility and resolving  
17 ambiguities, she must provide a clear and convincing reason for discounting plaintiff’s testimony.  
18 *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007) (internal quotation omitted). Here, the ALJ  
19 identified activities that plaintiff claims to engage in, but ignores the limitations that plaintiff  
20 notes when describing her ability to care for herself, drive, shop for groceries, and handle her  
21 finances. (AR 40.) Specifically, plaintiff’s hearing testimony clarifies that it takes her four to  
22 five hours to do her and her husband’s dishes because she has breathing problems and her bones  
23 ache while standing. (AR 68–69.) She needs frequent breaks to sit down and catch her breath,  
24 and the breaks typically last twenty minutes. (*Id.*) For similar reasons, plaintiff testified that she  
25 can only “make it through half of [her shower]” before needing a five-minute break to catch her  
26 breath. (AR 67.) Plaintiff also testified that when she has bone pains while taking care of her  
27 personal hygiene, her husband helps her. (AR 60.) Plaintiff’s function report states that she has  
28 problems dressing and needs personal reminders to take care of personal needs and grooming.



1 (*Id.* at 257.) As for her ability to drive, plaintiff testifies that although she can drive “a couple  
2 blocks if [she] needs to,” she does not drive often. (AR 62.) Finally, the function report states  
3 that plaintiff’s husband handles most of the shopping, that plaintiff shops only two times a month,  
4 and that she listed she can handle her finances because she has “no money.” (AR 255–56.) The  
5 ALJ impermissibly characterized plaintiff’s testimony by failing to consider the context in which  
6 plaintiff describes her daily activities. *Garrison v. Colvin*, 759 F.3d 995, 1016 (2014) (ALJ  
7 mischaracterized plaintiff’s testimony by failing to consider the limitations plaintiff describes in  
8 performing her daily tasks, which was an error of law).

9         The ALJ fails explain how the limited extent to which plaintiff claims to engage in her  
10 daily activities is inconsistent with testimony of her disabling symptoms. *See Orn*, 495 F.3d at  
11 639; *Cooper v. Bowen*, 815 F.2d 557, 561 (1987) (plaintiff need not “vegetate in a dark room  
12 excluded from human and social activity” to receive benefits). Plaintiff’s testimony that she can  
13 walk only short distances, that she can do dishes and care for herself so long as she takes frequent  
14 breaks, and that her husband is available to assist her, appears consistent with the cardiovascular  
15 symptoms and pain that plaintiff describes. (AR 52–71.) Moreover, plaintiff’s admission that she  
16 can handle her meager finances, or shop for groceries twice a week, does not on its face  
17 demonstrate that plaintiff has the necessary capabilities to work a full-time job. (AR 255–56.)  
18 The ALJ does not offer any further explanation as to how the plaintiff’s limited activities meet the  
19 threshold for transferable work skills. Because the ALJ did not consider the context of plaintiff’s  
20 daily activities nor did she explain how those activities are transferable to a work environment,  
21 the court cannot conclude that the ALJ was “especially cautious in concluding that daily activities  
22 are inconsistent with testimony ....” *Garrison*, 759 F.3d at 1016. Accordingly, the  
23 inconsistencies that the ALJ identified between plaintiff’s daily activities and her pain testimony  
24 do not satisfy the requirement of a clear, convincing, and specific reason to discredit plaintiff’s  
25 testimony regarding her disabling symptoms and limitations.

## 26           **2. Plaintiff Misrepresented Facts Relevant to the Issue of Her Disability**

27         The ALJ found evidence that plaintiff misrepresented facts relevant to the issue of her  
28 disability. First, plaintiff testified that she was told she is not expected to live over fifty years of

1 age, but the ALJ found no indication in plaintiff's medical records that she ever received such a  
2 prognosis. (AR 69.) The ALJ also found that plaintiff's treating cardiologist stated that plaintiff  
3 was "doing relatively well from a cardiac standpoint." (AR 40; AR 462–65.) Plaintiff contends  
4 that her testimony was not a misrepresentation of fact because she had heart catheterization  
5 surgery in March 2012 and "it is more likely than not" that a medical professional may have  
6 discussed her life expectancy with her without recording the interaction. (ECF 22 at 8; AR 463.)  
7 Defendant claims that the ALJ properly found this testimony to be a misrepresentation of fact  
8 because the record does not contain a reference to plaintiff's imminent death. (ECF No. 23 at 5.)

9 The court agrees with defendant. Where "the evidence is susceptible of more than one  
10 rational interpretation, the decision of the ALJ must be upheld." *Lewis v. Astrue*, 498 F.3d 909,  
11 911 (9th Cir. 2007) (internal quotation omitted). It could very well be that a doctor predicted  
12 plaintiff would not live over fifty years of age because plaintiff underwent heart catheterization  
13 surgery in March 2012, (AR 463), and that the medical professional did not find it necessary to  
14 record this statement to her. *See Orn*, 495 F.3d at 634 ("The primary function of medical records  
15 is to promote communication and recordkeeping among health care personnel – not to provide  
16 evidence for disability determinations."). An alternative interpretation of the lack of evidence in  
17 the medical record is that medical professionals never told plaintiff she would only live to fifty  
18 years of age. This interpretation is supported by evidence that plaintiff "was doing relatively well  
19 from a cardiac standpoint" just three months after her surgery. (AR 462–65.) Both  
20 interpretations are rational given the absences of evidence confirming plaintiff's prognosis, so the  
21 ALJ's finding that plaintiff misrepresented her lifespan "must be upheld." *Lewis*, 498 F.3d at  
22 911.

23 Second, the ALJ noted that in September 2012, plaintiff reported to an examining  
24 psychiatrist that she was on a heart transplant waitlist. (AR 40.) The ALJ found that the medical  
25 records do not indicate that plaintiff was ever placed on a heart transplant list; instead, they show  
26 that just three months before her psychiatric visit, a doctor stated she was "doing relatively well  
27 from a cardiac standpoint." (*Id.*; AR 462–65.) The ALJ made clear that plaintiff's  
28 misrepresentation suggests that plaintiff "generally may not be entirely reliable," regardless of

1 whether the misrepresentations were “the result of a conscious intent to mislead ....” (AR 40.)

2 Plaintiff does not challenge she misrepresented her heart condition. Rather, she asserts  
3 that because her psychiatric visit was six months after she received heart catheterization surgery,  
4 (AR 355), she may have been under immense stress that “caused her to report things that were  
5 inconsistent.” (ECF No. 22 at 9.) Plaintiff claims that under *Trevizo v. Berryhill*, 862 F.3d 987  
6 (9th Cir. 2017), the ALJ had a duty to inspect plaintiff’s inconsistent statement. Defendant  
7 counter that the ALJ properly found that the plaintiff’s claim of being on a heart transplant  
8 waitlist is a misrepresentation of fact, and that plaintiff waived the issue as to this finding because  
9 she failed to challenge that her statement was unsupported by the medical record. (ECF No. 23 at  
10 4–5; see *Gertsch v. Colvin*, 589 Fed. Appx. 381, 381 (9th Cir. 2015)).

11 Plaintiff’s speculation as to the reason for her misrepresentation is irrelevant to the ALJ’s  
12 determination that, regardless of plaintiff’s intent, plaintiff misrepresented her heart condition;  
13 thus, her testimony “may not be entirely reliable.” (AR 40.) Plaintiff failed to challenge the  
14 ALJ’s finding on appeal, so the issue as to whether plaintiff’s testimony that she was on a heart  
15 transplant waitlist is a misrepresentation of fact is waived. See *Smith v. Marsh*, 194 F.3d 1045,  
16 1052 (9th Cir. 1999) (arguments not raised by a part in its opening brief are deemed waived).  
17 Moreover, the ALJ’s finding that plaintiff misrepresented the severity of her heart condition is a  
18 clear and convincing reason to discredit her pain-related testimony supported by substantial  
19 evidence in the record. See *Garrison*, 759 F.3d at 1014 (ALJ must provide specific, clear, and  
20 convincing reasons supported by substantial evidence for finding symptom testimony not fully  
21 credible). Despite the fact that plaintiff underwent a heart catheterization surgery for heart failure  
22 in March 2012, (AR 355), the medical records make no reference to a heart transplant waitlist. In  
23 fact, the records show that in 2012, plaintiff’s cardiovascular examinations indicated normal rate  
24 and rhythm and “no evidence of congestive heart failure.” (AR 464–65, 520.) Plaintiff’s most  
25 recent medical records show primarily “normal” results, (see AR 550, 569), and a chest  
26 examination noted slight abnormalities “of no clinical significance.” (AR 578.) Finally,  
27 Plaintiff’s citation to *Trevizo v. Berryhill*, 862 F.3d 987 (9th Cir. 2017) is inapposite because the  
28 Ninth Circuit described an ALJ’s duty to inspect a plaintiff’s reasons for not taking medication,

1 which is not at issue here.

2 The ALJ relied on substantial evidence in finding that plaintiff's testimony regarding her  
3 lifespan and placement on a heart transplant waitlist were misrepresentations of fact. The court  
4 finds that plaintiff's misrepresentations are clear and convincing reasons for the ALJ's decision to  
5 discount plaintiff's subjective testimony regarding her symptoms because her testimony may not  
6 be entirely accurate.

7 **3. Plaintiff's Testimony Regarding the Severity of Her Symptoms Is Not Fully**  
8 **Supported by Objective Medical Evidence**

9 Third, the ALJ concluded that the objective medical evidence did not support plaintiff's  
10 allegations of the severity of her symptoms. (AR 40.) The ALJ supported her determination by  
11 pointing to the following evidence in the record:

- 12 1) that plaintiff's blood pressure level is often within normal limits, (e.g., AR 441;  
AR 470; AR 491);
- 13 2) that a doctor noted plaintiff was "doing well from a cardiac standpoint" and  
14 plaintiff denied any symptoms of heart failure, (AR 465; AR 469–11);
- 15 3) that her cardiovascular examinations were largely normal, (AR 519–21, 529);
- 16 4) that a doctor noted plaintiff was "doing a lot of walking without problems, and  
reported walking up to seven times a week in July 2014, (AR 519; AR 563);  
and,
- 17 5) that a doctor noted plaintiff had the ability to engage in an "active lifestyle  
without any limitations," (AR 521).

18 Plaintiff appears to argue that the ALJ impermissibly "summarized her version of the  
19 evidence in the file," and that the ALJ should have "explained how the medical evidence supports  
20 her assertion. (ECF No. 22 at 9) (citing *Brown-Hunter v. Colvin*, 806 F.3d 487, 494 (9th Cir.  
21 2015)). Plaintiff also asserts that the ALJ erred by solely relying on inconsistencies with the  
22 medical record to discount plaintiff's testimony. (*Id.*) Defendant contends that the ALJ's  
23 properly found plaintiff's allegations of breathing problems were not consistent with the evidence  
24 because plaintiff's cardiovascular examinations were largely normal. (ECF No. 23 at 6.)

25 In *Brown-Hunter v. Colvin*, the court held that an ALJ erred in finding a plaintiff's  
26 testimony not credible solely on the basis of an RFC finding. *Id.* The ALJ did not identify  
27 "statements she found not credible and why," but merely summarized the RFC finding and  
28 discounted plaintiff's testimony to the extent that it conflicted with the RFC. *Id.* Here, the ALJ's

1 determination is not nearly as conclusory as the determination at issue in *Brown-Hunter*. Instead,  
2 the ALJ focused in particular on plaintiff's allegations of the severity of her heart symptoms. The  
3 ALJ referenced plaintiff's claim that she has "heart pains" frequently that will continue for the  
4 rest of her life, that she has poor memory due to reduced blood flow, that she fatigues easily and  
5 must take frequent breaks, and she can only walk about a block. (AR 39; *see* AR 50–71.) Unlike  
6 the ALJ in *Brown-Hunter*, the ALJ here properly explained how these claims of the severity of  
7 plaintiff's cardiovascular impairment were inconsistent with the medical history, and the ALJ  
8 identified numerous medical reports that show plaintiff's heart condition to be largely normal.  
9 (AR 40–41.) Indeed, a medical professional noted in 2012 that plaintiff underwent an  
10 echocardiogram and blood work, and that she "had a normal exam." (AR 521.) As recently as  
11 2014, a medical professional noted that plaintiff had no chest pains and was "doing a lot of  
12 walking." (AR 524.) The ALJ also references the opinions of the state agency medical  
13 consultants, who found that plaintiff's overall condition was improving with conservative  
14 treatment in July 2012, and in March 2013. (AR 41; AR 114–39.) Plaintiff does not contend that  
15 those cited records were inaccurate or unrepresentative. The ALJ properly considered the lack of  
16 supporting medical evidence as a clear and convincing reason to discount plaintiff's testimony  
17 regarding the severity, persistence and limiting effects of her symptoms. *Burch v. Barnhart*, 400  
18 F.3d 676, 681 (2005).

19 While a lack of objective medical evidence supporting the degree of limitation "cannot  
20 form the sole basis for discounting pain [and limitations] testimony," *Id.*, the ALJ's determination  
21 is also based on the finding that plaintiff had misrepresented facts concerning her disability, as  
22 discussed above. Only one out of three reasons given by the ALJ in relation to plaintiff's  
23 credibility was not supported by substantial evidence. Thus, even if this court found that the ALJ  
24 committed error as to this factor, any error is harmless as it "does not negate the validity of the  
25 ALJ's ultimate conclusion that [plaintiff] was not credible." *Batson v. Comm'r of Soc. Sec.*  
26 *Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004). Accordingly, because the ALJ's credibility finding  
27 is based upon clear and convincing reasons supported by substantial evidence, remand is not  
28 warranted. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008).

1  
2 **IV. CONCLUSION**

3 The ALJ did not err in her step five analysis, as her finding that plaintiff remained able to  
4 perform other work in the national economy was supported by substantial evidence in the record.  
5 Accordingly, the court recommends that plaintiff's motion for remand (ECF No. 22) be denied  
6 and that defendant's cross-motion to affirm (ECF No. 23) be granted.

7 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Local Rule IB 3-2, the parties may file  
8 specific written objections to this Report and Recommendation within fourteen days of receipt.  
9 These objections should be entitled "Objections to Magistrate Judge's Report and  
10 Recommendation" and should be accompanied by points and authorities for consideration by the  
11 District Court.

12 2. This Report and Recommendation is not an appealable order and any notice of  
13 appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's  
14 judgment.

15 **V. RECOMMENDATION**

16 **IT IS THEREFORE RECOMMENDED** that plaintiff's motion for remand or reversal  
17 (ECF No. 22) be **DENIED** and defendant's cross-motion to affirm (ECF No. 23) be **GRANTED**.

18 **IT IS FURTHER RECOMMENDED** that the Clerk **ENTER JUDGMENT** and close  
19 this case.

20 **DATED:** December 6, 2017.

21   
22 **UNITED STATES MAGISTRATE JUDGE**  
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